Frontier-Trading Sdn Bhd v Lebbey Sdn Bhd (Chan Kwok Chin, Intervener)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S 3–22–423 OF 2000
MOHD HISHAMUDIN J
4 JANUARY 2007

Civil Procedure — Parties — Intervention — Application by third party for leave to intervene and be added as second defendant — Trial completed, judgment entered and perfected — Intervenor a bona fide purchaser for value without notice — Meaning of 'at any stage of the proceedings' — Whether leave to intervene could be granted at this stage — Whether intended intervenor had proven a legal interest directly related to the subject matter of the action — Rules of the High Court 1980 O 15 r 6

The intended intervenor sought vide encl 56 to intervene and be added as a second defendant to the present suit. In the present suit, the plaintiff alleged that pursuant to an agreement, the plaintiff agreed to buy a 1½ storey industrial factory known as Lot 64, Pandan Indah Industrial Park from the defendant for RM288,000. The plaintiff claimed that RM57,600 was paid as the deposit and was acknowledged by the defendant. The balance of 80% was to be paid by way of installments. The plaintiff, subsequently, obtained a loan of RM200,000 from RHB Bank Berhad to settle the balance of the purchase price. The plaintiff further alleged that the defendant was to deliver vacant possession of the property on or before 31 May 1996 which the defendant failed to do and the plaintiff was entitled to damages in the sum of RM22,516.08 being damages for late delivery. Thereafter the plaintiff alleged that before their bank could release the balance of the purchase price the defendant wrongly terminated the agreement by way of a letter dated 2 September 1999; which the plaintiff, had no knowledge of and only came to know about the letter from the plaintiff's bank. The defendant failed to take any step to perfect the sale of the property despite the plaintiff's requests and therefore present suit was filed claiming for specific performance, damages for breach of contract, an injunction to stop the defendant from dealing with the property and damages for late delivery.

The trial commenced on 25 February 2004. The defendant was wound up during the trial but on 8 October 2004 the plaintiff obtained leave from the winding up court to continue the action against the defendant. Throughout the trial and until the plaintiff closed their case the defendant did not attend the hearing. On 14 July 2006, the plaintiff was granted specific performance of the agreement and awarded damages for the late delivery of vacant possession of the property. After conclusion of the trial and judgment had been entered, the intended intervener, on 13 October 2006, filed the present summons in chambers (encl 56) on the ground that he had on 2 September 1999 bought the same factory building (ie the subject matter of the suit) from the defendant for RM338,000. He alleged that he had paid to the defendant the sum of RM101,400 as deposit and that the balance of purchase price was paid through a loan secured from Hong Leong Bank Berhad. The intended intervener also

claimed that the defendant had delivered vacant possession to him and the intended intervener had rented the property to a third party. The intended intervener alleged that he only came to know about the court's judgment in August 2006 when his tenant informed him that a person came to the factory and claimed to be the rightful owner of the property and directed the tenant to pay the rent to him (the said person) instead of to the intended intervener.

Held, allowing the application with costs and granting a stay of execution of the judgment:

(1) The court held in the present case that even though this application to intervene was made after the conclusion of full trial and after judgment being entered, it is the courts opinion that the intended intervener should be allowed to intervene. The phrase of 'at any stage of proceedings' in O 15 r 6(2) of the RHC carries the meaning that the application to intervene could be made at any stage of the proceedings even after the conclusion of full trial and judgment had been entered provided the applicant could show that he had direct legal interest with the subject matter of the suit and that the execution of the judgment had yet to be completed (see para 21).

(2) The court was of the opinion that the intended intervener had shown that he had an interest directly related to the subject matter of the action, a legal interest. He had through the affidavits provided evidence that he had paid the full purchase price through his financier for the said property, and only waiting for it to be transferred to his name. The court's judgment clearly affected the intervener's interest. He should be allowed to intervene. After all the plaintiff was at liberty to oppose any application made by the intended intervener once he was allowed to intervene (see para 22).

(3) The Court of Appeal in *Tai Choi Yu v Syarikat Tingan Lumber Sdn Bhd* [1998] 4 MLJ 275 held that before the court could grant leave to intervene, an applicant must show that he has a legal interest directly related to the subject matter of the action; and that the Court of Appeal further held that the proposed intervener in that case had no such interest. However, in the present case, the intended intervener had a direct interest in the subject matter of the action (see para 19).

[Bahasa Malaysia summary

Pencelah bertujuan memohon melalui lampiran 56 untuk mencelah dan dimasukkan sebagai defendan kedua dalam guaman ini. Dalam guaman ini, plaintif mengatakan bahawa menurut satu perjanjian, plaintif bersetuju membeli kilang perindustrian 1½ tingkat dikenali sebagai Lot 64, Pandan Indah Industrial Park daripada defendan untuk RM288,000. Baki 80% akan dibayar secara ansuran. Plaintif, berikutan itu, mendapat pinjaman RM200,000 daripada Bank RHB untuk menyelesaikan baki harga belian. Plaintif seterusnya mengatakan bahawa defendan hendaklah menyerahkan milikan kosong hartanah itu pada atau sebelum 31 Mei 1996 yang mana defendan gagal berbuat demikian dan plaintif berhak kepada ganti rugi sejumlah RM22,516.08 yang merupakan ganti rugi untuk penyerahan lewat.

Kemudian plaintif mengatakan sebelum bank mereka melepaskan baki harga belian defendan telah salah menamatkan perjanjian melalui surat bertarikh 2 September 1999; yang mana plaintif, tiada pengetahuan dan hanya mengetahui tentang surat itu daripada bank plaintif. Defendan gagal mengambil apa-apa langkah untuk menyempurnakan jualan hartanah itu meskipun terdapat permintaan daripada plaintif dan oleh itu guaman ini telah difailkan menuntut pelaksanaan spesifik, ganti rugi kerana melanggar kontrak, satu injunksi menghalang defendan daripada berurusan dengan hartanah itu dan ganti rugi untuk penyerahan lewat.

Perbicaraan bermula pada 25 Februari 2004. Defendan telah digulungkan semasa perbicaraan tetapi pada 8 Oktober 2004 plaintif memperoleh kebenaran daripada mahkamah penggulungan untuk meneruskan tindakan terhadap defendan. Sepanjang perbicaraan dan sehingga plaintif menutup kes mereka defendan tidak hadir untuk perbicaraan tersebut. Pada 14 Julai 2006, plaintif dibenarkan pelaksanaan spesifik terhadap perjanjian tersebut dan diawardkan ganti rugi untuk serahan lewat milikan kosong hartanah itu. Setelah perbicaraan berakhir dan penghakiman disampaikan, pencelah bertujuan, pada 13 Oktober 2006, telah memfailkan saman dalam kamar semasa (lampiran 56) atas alasan bahawa beliau pada 2 September 1999 telah membeli bangunan kilang yang sama (iaitu perkara pokok guaman) daripada defendan untuk RM338,000. Beliau mengatakan bahawa beliau telah membayar defendan sejumlah RM101,400 sebagai deposit dan bahawa baki harga belian telah dibayar melalui satu pinjaman yang diperoleh daripada Hong Leong Bank Berhad. Pencelah bertujuan juga menuntut bahawa defendan telah menyerahkan milikan kosong kepadanya dan pencelah bertujuan telah menyewakan hartanah itu kepada pihak ketiga. Pencelah bertujuan mengatakan bahawa beliau hanya mengetahui tentang penghakiman mahkamah dalam bulan Ogos 2006 apabila penyewanya memberitahunya seseorang telah datang ke kilang dan mendakwa sebagai pemilik sah hartanah itu dan mengarahkan penyewa membayar sewa kepadanya (orang itu) dan bukan kepada pencelah bertujuan.

Diputuskan, membenarkan permohonan dengan kos dan membenarkan penggantungan pelaksanaan penghakiman tersebut:

(1) Mahkamah memutuskan bahawa dalam kes semasa meskipun permohonan ini untuk mencelah dibuat selepas perbicaraan penuh berakhir dan selepas penghakiman disampaikan, adalah pendapat mahkamah bahawa pencelah bertujuan sepatutnya dibenarkan mencelah. Ungkapan 'at any stage of proceedings' dalam A 15 k 6(2) KMT membawa maksud bahawa permohonan untuk mencelah boleh dibuat pada mana-mana peringkat prosiding bahkan selepas perbicaraan selesai dan penghakiman dimasukkan dengan syarat pemohon dapat menunjukkan bahawa beliau mempunyai kepentingan sah dengan perkara pokok guaman dan bahawa pelaksanaan penghakiman masih belum selesai (lihat perenggan 21).

(2) Mahkamah berpendapat bahawa pencelah bertujuan telah menunjukkan beliau mempunyai kepentingan secara langsung berkaitan perkara pokok tindakan tersebut, satu kepentingan sah. Beliau melalui afidavit yang memberikan keterangan bahawa beliau telah membayar sepenuhnya harga belian melalui pembiayanya untuk hartanah tersebut, dan hanya menunggu

untuk ia dipindahkan kepada namanya. Penghakiman mahkamah jelas menjejaskan kepentingan pencelah. Beliau patut dibenarkan mencelah. Bahkan plaintif bebas membangkang apa-apa permohonan yang dibuat oleh pencelah bertujuan setelah beliau dibenarkan mencelah (lihat perenggan 22).

(3) Mahkamah Rayun dalam *Tai Choi Yu v Syarikat Tingan Lumber Sdn Bhd* [1998] 4 MLJ 275 memutuskan bahawa sebelum mahkamah memberikan kebenaran untuk mencelah, seorang pemohon hendaklah membuktikan bahawa beliau mempunyai kepentingan sah berkaitan secara langsung dengan perkara pokok tindakan, dan Mahkamah Rayuan seterusnya memutuskan bahawa pencelah yang dicadangkan dalam kes tersebut tiada kepentingan sedemikian. Namun, dalam kes ini, pencelah bertujuan mempunyai kepentingan langsung dalam perkara pokok tindakan tersebut (lihat perenggan 19).]

Notes

For cases on intervention of parties, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5003–5041.

Cases referred to

Ang Tun Cheong v Lint Yeok Beng (Public Bank, intervenor) [2002] 6 MLJ 198 (redf)
EON Bank Bhd v Pang Chong Thai [2001] 5 MLJ 409 (refd)
Tai Choi Yu v Syarikat Tingan Lumber Sdn Bhd [1998] 4 MLJ 275 (refd)
Tohtonku Sdn Bhd v Superace (M) Sdn Bhd [1992] 2 MLJ 63 (refd)

Legislation referred to

Rules of the High Court 1980 O 15 r 6(2)

Edwin Rajasooria (KS Ong & Co) for the plaintiff.
Patricia Chan (Jessie Lee with her) (Lee Ross & Ling) for the intended intervener.

Mohd Hishamudin J:

[1] Enclosure 56 is an application by the intended intervener to the judge in chambers to intervene in the proceeding and to be made as a second defendant in the suit pursuant to O 15 r 6 of the Rules of the High Court 1980 ('the RHC'). I have allowed the intended intervener's application with costs in the cause, and I shall now give my grounds.

[2] In the present case, the plaintiff alleged that under a written agreement between the plaintiff and the defendant, the plaintiff had agreed to buy a 1½ storey industrial factory known as Lot 64, Pandan Indah Industrial Park from the defendant for RM288,000. The plaintiff claimed that they had paid RM28,800 as the first deposit and another RM28,800 for the second deposit, all in all, totalling RM57,600, that is to say, 20% of the purchase price; and these payments had been acknowledged by the defendant. The balance of 80% was to be paid by way of instalments. The plaintiff, subsequently, obtained a loan of RM200,000 from RHB Bank Berhad to settle the balance of the purchase price. The plaintiff further alleged that under the

agreement the defendant was to deliver vacant possession of the property on or before 31 May 1996, failing which the plaintiff would be entitled to damages of 12% per annum on the amount of the purchase price. According to the plaintiff the defendant had failed to deliver vacant possession by the stipulated dateline of 31 May, 1996; and as a consequence, was indebted to the plaintiff in the sum of RM22,516.08 being damages for late delivery calculated at 12% per annum on the amount of the purchase price.

[3] It is also the plaintiffs allegation that before their bank could release the balance of the purchase price the defendant wrongly terminated the agreement by way of a letter dated 2 September 1999; which letter, according to the plaintiff, never came to their knowledge. The plaintiff only came to know about the letter from the plaintiffs bank. The plaintiff alleged that despite several requests from the plaintiff, the defendant failed to take any step to perfect the sale of the property. Hence the plaintiff commence the present suit claiming for specific performance, damages for breach of contract, an injunction to stop the defendant from dealing with the property and damages for late delivery.

[4] The trial for the present action commenced on 25 February 2004. However, while the trial was still at the stage of the plaintiffs case, the defendant was wound up. On 8 October 2004, the plaintiff obtained leave from the winding up court to continue the action against the defendant. At the continuation hearing on 30 March 2005, the representative of the Director General of Insolvency informed the court that the Director General did not intend to defend the suit.

[5] The trial continued. The plaintiff called witnesses to give evidence on their behalf. Throughout the trial and until the plaintiff closed their case the defendant did not attend the hearing. On 14 July 2006, at the conclusion of the trial, I gave judgment in favour of the plaintiff. I granted the plaintiff specific performance of the agreement and awarded them damages for the late delivery of vacant possession of the property.

[6] Now, after the conclusion of the trial and judgment had been entered, the intended intervener, on 13 October 2006, filed the present summons-in-chambers (encl 56) for an order that he be allowed to intervene in the present action and be added as the second defendant; and, in the event that he is allowed to intervene, he intends thereafter to file an application to set aside the judgment of this court of 14 July 2006.

[7] The intended intervener alleges that he had on 2 September 1999 bought the same factory building (ie the subject matter of the suit) from the defendant for RM338,000. He alleges that he had paid to the defendant the sum of RM101,400 as deposit and that the balance of purchase price was paid through a loan secured from Hong Leong Bank Berhad. The intended intervener also claims that the defendant had delivered vacant possession to him and the intended intervener had rented the property to a third party.

[8] The intended intervener further alleges that at all material time he was not aware that the defendant had entered into an agreement with the plaintiff. He only came to know about the court's judgment in August, 2006 when his tenant informed him that a person came to the factory and claimed to be the rightful owner of the property. The intended intervener claims that the said person had directed the tenant to pay the rent to him (the said person) instead of to the intended intervener.

[9] The intended intervener, through his solicitors, conducted a file search at the High Court and found out about this present suit. He alleges that all the while he was unaware of the present suit.

[10] On 4 January 2007, I allowed the intended intervener's application to intervene and be added as a second defendant. I also granted a stay of a execution of the judgement until disposal of the intervener's application to set aside the judgement

[11] The learned counsel for the intended intervener in his written submission referred to the supreme court's case of *Tohtonku Sdn Bhd v Superace (M) Sdn Bhd* [1992] 2 MLJ 63 where it was held as follows (at p 63):

> In determining whether a party may be added as an intervener, the test is if his 'legal interests', ie his right against or liabilities to any party to the action in respect of the subject matter of the action would be directly affected by any order or judgement which might be made in the action

[12] In this case cited, the supreme court laid down the test in determining whether a party may be added as intervener, that is, to determine whether 'his legal interest' would be directly affected by any order or judgement which might be made

[13] The intended intervener's counsel submitted that his client's legal interest would be directly and gravely affected by the judgement made as he had bought and made full payment of the purchase price of the property. Even though a judgement has been entered, the intended intervener claims that he is bona fide purchaser for value without notice. The intended intervener contends that he had made full consideration in respect of the purchase and only awaiting for the transfer of the property into his name.

[14] The plaintiff, in reply to the above submission, refers to O 15 r 6(2) of the RHC, which provides:

> 6 Misjoinder and non-joinder of parties.
>
> (2) ...
>
> (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application —
>
> (a) ...
>
> (b) order any of the following persons to be added as a party, namely—

(i) any person who ought to have been joined ss a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or

(ii) any person between whom and a party to the cause or matter there exist a question or issue arising out of or relating to or connected Tilth any relief or remedy claimed in the cause or matter which in the opinion of court it would be just and convenient to determine as between him and that party as well as between parties to the cause or matter;

[15] The plaintiff submits that it is too late for the applicant to now intervene as the trial had concluded and judgment entered. Thus, the issue that for the court's determination is the meaning of the words 'at any stage of proceeding', as found in sub-r (2) of r 6 of O 15.

[16] The plaintiff refers to the Court of Appeal's case of *Tai Choi Yu v Syarikat Tingan Lumber Sdn Bhd* [1998] 4 MLJ 275 where the court held that:

> Although O 15 r 16(2) of RHC states that an application to intervene could be made 'at any stage of the proceedings', this does not mean that such an application can be made after final judgment had been entered.

[17] The plaintiff submits that an application to intervene must be made before the final judgment is entered or before the judgment is perfected or before the proceedings end. The plaintiff contends that since judgment had been entered and perfected, there is, therefore, no longer any proceeding in existence. Thus, the application to intervene should not be allowed.

[18] The intended intervener, replying to the plaintiffs submission, refers to the High Court case of *Ang Tun Cheong v Lint Yeok Beng (Public Bank, intervenor)* [2002] 6 MLJ 198. In this case cited, Public Bank Berhad was allowed to intervene and set aside the judgment in default against the defendant although the final judgment had been entered. The court held (at p 199):

> Although O 15 r 6(2) of the Rules of the High Court 1980 stated that an application to intervene may not be made after final judgment had been entered, if an applicant had an interest related to the subject matter, the court would allow him the right to intervene.

[19] The learned judge in the above case referred to the case of *EON Bank Bhd v Pang Chong Thai* [2001] 5 MLJ 409. The learned counsel for the intended intervener submits that *Tai Choi Yu* can be distinguished from the present cases. The Court of Appeal in *Tai Choi Yu* have held that before the court could grant leave to intervene, an applicant must show that he has a legal interest directly related to the subject matter of the action; and that the Court of Appeal further held that the proposed intervener in that case had no such interest. However, in the present case, the intended intervener has a direct interest in the subject matter of the action.

[20] With respect, I am in agreement with the intended intervener's contention. In my view, since in *Tai Choi Yu* the Court of Appeal held that the applicant had no

direct legal interest, therefore, that part of the judgment of the Court of Appeal which I have quoted above, concerning the timing of the making of the application to intervene, (that is, made after final judgment had been entered), must be regarded as a mere obiter dicta.

[21] Accordingly, I hold in the present case that even though this application to intervene was made after the conclusion of full trial and after judgment being entered, I am, nevertheless, of the opinion that the intended intervener should be allowed to intervene. To my mind, the phrase of 'at any stage of proceedings' in O 15 r 6(2) of the RHC carries the meaning that the application to intervene could be made at any stage of the proceedings even after the conclusion of full trial and judgment has been entered provided the applicant could show that he has direct legal interest with the subject matter of the suit and that the execution of the judgment is yet to be completed.

[22] I am of the opinion that the intended intervener has shown that he has an interest directly related to the subject matter of the action, a legal interest. He has through the affidavits provides evidence that he had paid the full purchase price through his financier for the said property, and only waiting for it to be transferred to his name. The court's judgment clearly affects the intervener's interest. He should be allowed to intervene. After all the plaintiff is at liberty to oppose any application made by the intended intervener once he is allowed to intervene.

[23] I also granted a stay of the execution of the judgment until disposal of the intervener's application to set aside the judgement. As the judgment given to the plaintiff includes the remedy of specific performance, to my mind, if a stay is not granted, it would definitely cause irremediable injury to the intervener. Therefore, a stay of the execution of the judgment is necessary.

Application allowed with costs. Stay of execution granted.

Reported by Navit Kaur Randhawa